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No. 86-87

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO AND VINCENT CAFARO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Section 3142(e) of the Bail Reform Act of 1984, which authorizes the pretrial detention of an indicted defendant if no release conditions "will reasonably assure * * * the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)), is unconstitutional on its face.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 794 F.2d 64. The opinion of the district court (Pet. App. 33a-57a) is reported at 631 F. Supp. 1364.

JURISDICTION

The judgment of the court of appeals (Pet. App. 58a-59a) was entered on July 3, 1986. The petition for a writ of certiorari was filed on July 21, 1986, and was granted on November 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 3142(e) of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3142(e), provides in pertinent part:

> If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably

assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.

STATEMENT

Respondents Anthony Salerno, the reputed leader of the Genovese organized crime family, and Vincent Cafaro, a reputed "captain" in that organization (see Pet. App. 3a, 35a), are presently charged with various racketeering offenses and violent crimes. The United States sought pretrial detention of respondents pursuant to Section 3142(e) of the Bail Reform Act of 1984 (18 U.S.C. (Supp. II) 3141 *et seq.*) which authorizes the detention of a criminal suspect charged with a crime of violence if no release conditions "will reasonably assure * * * the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)). The district court ordered the detention of respondents based on the government's "overwhelming" evidence that, if released, they would continue to engage in violent criminal behavior (Pet. App. 47a, 55a). The court of appeals agreed that no condition of release would reasonably assure the safety of other persons and the community (*id.* at 13a). It nevertheless reversed, holding that Section 3142(e)'s authorization of pretrial detention based upon a judicial determination of future dangerousness is facially unconstitutional as a violation of substantive due process (Pet. App. 15a).

1. The Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3141 *et seq.*, revised the federal law governing pretrial release of criminal suspects. Section 3141(a) of the Act provides that a judicial officer shall determine whether an arrested person will be released or detained in accordance with the provisions of the Act. 18 U.S.C. (Supp. II) 3141(a). Section 3142(a) sets forth the available options. See 18 U.S.C. (Supp. II) 3142(a). The judicial officer may

order that the person be: (1) released on his own recognizance or upon execution of an unsecured bond;[1] (2) released subject to various specified conditions;[2] (3) temporarily detained to permit revocation of a prior release order, deportation, or exclusion;[3] or (4) detained pursuant to the provisions of subsection (e). *Ibid.*

Section 3142(e) provides that "[i]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." 18 U.S.C. (Supp. II) 3142(e). Upon the government's request, the judicial officer must hold a pretrial detention hearing in cases involving crimes of violence, offenses that may result in a sentence of life im-

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[1] An arrested person qualifies for unsecured release unless "the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. (Supp. II) 3142(b).

[2] A suspect is subject to conditional release if the judicial officer determines that the person does not qualify for release upon his own recognizance or upon execution of an unsecured bond. 18 U.S.C. (Supp. II) 3142(c). Section 3142(c) imposes a mandatory condition that the person refrain from violating federal, state, or local law. 18 U.S.C. (Supp. II) 3142(c)(1). It also describes some of the other monetary and nonmonetary release conditions that may be utilized. 18 U.S.C. (Supp. II) 3142(c)(2)(A-N). The judicial officer must select "the least restrictive * * * condition, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community" (*ibid.*).

[3] The judicial officer may detain a person for up to ten days, to allow notice to the proper authorities, if the person poses a risk of flight or danger to other persons or the community and is (1) on release pending trial or appeal; (2) on probation or parole; or (3) subject to deportation or exclusion under the immigration laws. 18 U.S.C. (Supp. II) 3142(d).

prisonment or death, serious drug-related crimes, and felonies committed by persons who have previously been convicted of other serious crimes. 18 U.S.C. (Supp. II) 3142(f)(1). In addition, the judicial officer must hold a pretrial detention hearing, in response to a government request or upon his own motion, in cases involving a serious risk that the person will flee or attempt to obstruct justice. 18 U.S.C. (Supp. II) 3142(f)(2).

Section 3142(f) also specifies a series of procedural safeguards that accompany the pretrial detention hearing. The person resisting detention may request the presence of legal counsel at the hearing; he may testify and present witnesses on his own behalf; he may cross-examine other witnesses who appear at the hearing; and he may present evidence by proffer. 18 U.S.C. (Supp. II) 3142(f). A judicial officer's finding that no conditions will reasonably assure the safety of other persons and the community must be supported by "clear and convincing evidence" (*ibid.*).

Section 3142(g) specifies the factors that a judicial officer shall take into account in considering whether to detain a criminal suspect. See 18 U.S.C. (Supp. II) 3142(g). These factors include the nature and seriousness of the charges, the weight of the evidence against the suspect, the history and characteristics of that person, and the nature and seriousness of the danger to any person or the community that would be posed by his release (*ibid.*). Section 3142(i) specifies the required contents of a detention order. See 18 U.S.C. (Supp. II) 3142(i). The order must include written findings of fact and a statement of reasons for the detention; it must provide that the person detained be separated to the extent practicable from persons awaiting or serving sentences; and it must direct that the detained individual be afforded a reasonable opportunity for private consultation with his lawyer and be made available for necessary court appearances (*ibid.*). Finally, Section

3145 provides for expedited review of detention orders. 18 U.S.C. (Supp. II) 3145(b) and (c).

2. On March 20, 1986, a federal grand jury returned a 29-count indictment charging respondents and 13 other members and associates of the Genovese organized crime family with various crimes, including conspiracy and substantive racketeering offenses (18 U.S.C. 1962(c)) and (d)); 16 counts of mail fraud (18 U.S.C. 1341) in connection with a construction industry bid-rigging scheme; wire fraud (18 U.S.C. 1343) in connection with the election of Roy L. Williams as General President of the International Brotherhood of Teamsters; eight counts of extortion (18 U.S.C. 1951) from a New York area food company; and the operation of illegal numbers and bookmaking businesses (18 U.S.C. 1955). See Pet. App. 2a-3a, 35a-36a. The racketeering counts of the indictment allege 35 specific racketeering acts, including two separate murder conspiracies (*id.* at 2a-3a).

Respondents were arrested and arraigned on March 21, 1986. The United States immediately moved for pretrial detention pursuant to 18 U.S.C. (Supp. II) 3142(e), and the district court (Walker, J.) held an evidentiary hearing in accordance with 18 U.S.C. (Supp. II) 3142(f). The government submitted evidence demonstrating that respondents have engaged in a continuing course of illegal and violent activity and that no conditions of release would prevent respondents from resuming those activities during the pendency of their trial. The government provided a detailed proffer of anticipated testimony from trial witnesses and evidence obtained through electronic surveillance to demonstrate that respondents posed a continuing danger to the community that justified pretrial detention. See Pet. App. 2a-4a, 34a-45a.

For example, the government disclosed in its proffer that Jimmy Fratianno, a federal witness, would testify that he attended a meeting with high-ranking members of the Genovese family at which respondent Salerno and

others agreed to place a "contract" for the murder of John Spencer Ullo, a California organized crime figure (Pet. App. 37a-38a).[4] The government also disclosed that Angelo Lonardo, another federal witness who is the former "underboss" of the Cleveland organized crime family and a life-long friend of Salerno, would testify that Salerno participated in the decision to murder John Simone, a Philadelphia organized crime figure, and the separate decision to murder Danny Greene and John Nardi, two Cleveland organized crime figures (*id.* at 38a-39a).[5] In addition, the government disclosed evidence obtained through electronic surveillance demonstrating that Salerno and Cafaro routinely used violence to maintain control over the Genovese family's gambling, loansharking, and labor union activities (*id.* at 39a-44a).

In response, Salerno offered testimony from character witnesses and challenged the credibility of the government witnesses. Cafaro offered no evidence. He contended that the electronic surveillance evidence revealed, at most, only "tough talk." Pet App. 44a-45a.

The district court, characterizing the evidence as "overwhelming" (Pet. App. 47a, 55a), found that the government had established by clear and convincing evidence that "Salerno is the head, or 'Boss,' of an organization engaged in extortion, loansharking, illegal gambling, and murder" (*id.* at 47a-48a) and that "Cafaro has directed violent acts and is ready, willing and able to direct violent acts in the future" (*id.* at 55a). The court concluded (*id.* at 56a-57a):

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[4] This murder conspiracy ultimately failed because Ullo learned of the plan and killed the person who had been dispatched to fulfill the contract (Pet. App. 38a).

[5] Simone's body was found on a roadside in Staten Island, shot three times in the head (Pet. App. 38a-39a). The plot to kill Greene and Nardi contemplated their murder in New York. However, they ultimately died in car bombings in Cleveland (*id.* at 39a).

> The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of [the criminal enterprise's] leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose to the community is self-evident.
>
> Thus, after carefully considering all the factors enumerated in 18 U.S.C. section 3142(g), this court finds that the government has met its burden of proof by clear and convincing evidence that no condition or combination of conditions of release of these defendants will reasonably assure the safety of any other person or of the community.

After making those findings, the court entered an order detaining respondents.[6]

Respondents sought reconsideration of the detention decision, which a second district judge (Lowe, J.) denied (Pet. App. 6a-7a). They then sought review from the court of appeals. That court first rejected Salerno's argument that the government had provided insufficient notice of its intention to use wiretap evidence, holding that Salerno lacked standing to seek suppression of that evidence (*id.* at 9a-12a). The court further concluded (*id.* at 13a) that the evidence proffered by the government "amply supported

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[6] The district court issued a detention order on March 28, 1986. That order, however, was not entered on the court's criminal docket. See Pet. App. 8a. The district court later issued a virtually identical order on April 2, 1986, which was entered on the court's docket on April 7, 1986 (*ibid.*). That order, which the court of appeals treated as the relevant decision (*ibid.*), is reproduced in the appendix to the petition for a writ of certiorari (*id.* at 33a-57a).

the court's findings that the government had proven by clear and convincing evidence that Salerno 'is a danger to the community as the "Boss" of an organization that uses force, violence, and threats of force and violence to further its illegal operations', [quoting *id.* at 48a], and that Cafaro 'has directed violent acts and is ready, willing and able to direct violent acts in the future' [quoting *id.* at 55a]." The court nonetheless reversed the district court's detention decision, concluding that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community" (*id.* at 14a).

The court agreed that a judicial officer may order pretrial detention in response to "risk of flight or threats to potential witnesses, jurors, or others involved in the judicial process" (Pet. App. 14a). It stated, however, that "[t]he sole bases for the detention order in this case are the findings that the defendants would, if released, carry on 'business as usual' notwithstanding any release conditions, and that business as usual involves threats and crimes of violence" (*id.* at 15a). The court concluded that detention for the purpose of protecting community safety is "repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes" (*ibid.*).

Quoting from Judge Newman's separate opinion in *United States* v. *Melendez-Carrion*, 790 F.2d 984, 1000-1001 (2d Cir. 1986), petition for cert. pending, No. 86-5571, the court of appeals stated:

> "In a constitutional system where liberty is protected both substantively and procedurally by the limitations of the Due Process Clause, a total deprivation of liberty cannot validly be accomplished [on the sole ground that] doing so is a rational means of regulating to promote even a substantial governmental interest."

Pet. App. 16a (bracketed portion added by the court).[7] The court, quoting Judge Newman further, stated (*ibid.*, quoting 790 F.2d at 1001 (emphasis added by the court)):

> "Even if a statute provided that a person could be incarcerated for dangerousness only after a jury had been persuaded that his dangerousness [had been] established beyond a reasonable doubt at a trial surrounded by all of the procedural guarantees applicable to determinations of guilt, the statute could not be upheld, no matter how brief the period of detention. It would be constitutionally infirm, not for lack of procedural due process, but because *the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause.*"

Once again quoting Judge Newman, the court stated that " 'incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes.' " Pet. App. 17a (quoting 790 F.2d at 1001). The court added that "[e]ven the risk of some serious crime, such as destruction of an airliner * * * must, under our Constitution, be guarded against by surveillance of the suspect and prompt trial on any pending charges, and not by incarceration simply because untested evidence indicates probable cause to believe that he has committed one crime and is a risk to commit another one" (Pet. App. 20a).

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[7] In *Melendez-Carrion*, the Second Circuit reversed a district court's detention order on due process grounds in a decision that produced three separate—and inconsistent—opinions from the panel. The Second Circuit denied, without opinion, the government's petition for rehearing with a suggestion for rehearing en banc. Several defendants in that case who were detained on risk of flight grounds have since petitioned for a writ of certiorari.

Chief Judge Feinberg dissented (Pet. App. 23a-32a). He concluded that "detaining indicted defendants under the Bail Reform Act for a limited time on the basis of clear and convincing evidence that nothing short of confinement will prevent them from violating the law while on release does not violate any norm of decency implicit in the concept of ordered liberty, and does not violate the Due Process Clause" (*id.* at 29a). He relied, in part, on this Court's holding in *Schall* v. *Martin*, 467 U.S. 253 (1984), that pretrial detention of juveniles based on their perceived danger to the community is compatible with due process (Pet. App. 24a-25a), observing that the societal interest in protecting the public from violent crime "does not vary in strength with the age of the person to be detained" and that, "[i]f anything, the need to shield the community from the hazards of pretrial crimes committed by adults is more compelling, since adults may have superior access to the means of committing more serious and far-reaching offenses" (*id.* at 25a).

Judge Feinberg added that while "[d]ue process also dictates that the government not pursue its goals through 'conduct that shocks the conscience' " (Pet. App. 26a, quoting *Rochin* v. *California*, 342 U.S. 165, 172 (1952)), "[t]here is nothing inherently shocking to the conscience in using a prediction of future criminality to justify confinement" (Pet. App. 26a). He also concluded that the statutory pretrial detention provisions, as applied in this case, are consistent with due process (*id.* at 29a-32a).

SUMMARY OF ARGUMENT

A. In finding the federal pretrial detention statute unconstitutional on its face, the court of appeals took the position that the Due Process Clause disables the government from detaining any criminally dangerous person who has not been convicted of a crime. In the court's view, no statute authorizing pretrial detention for dangerousness

could withstand constitutional scrutiny, regardless of the brevity of the detention or the strength of the government's showing of dangerousness.[8]

This Court's decisions demonstrate that the court of appeals' due process analysis is wrong. Substantive due process principles do not impose a per se prohibition on the pretrial detention of criminal defendants who are shown to be likely to commit crimes while on release pending trial. Instead, due process requires that a statute authorizing such detention strike an appropriate balance between a defendant's interest in pretrial release and the government's duty to prevent crime. The pretrial detention provisions of the Bail Reform Act of 1984 were carefully formulated to strike the proper balance between the individual's liberty interest and the public's interest in community safety. Because the balance struck by Congress is a reasonable one, the pretrial detention statute should be upheld.

B. This Court has repeatedly recognized that the government may detain potentially dangerous persons as a regulatory measure to protect important public interests. Regulatory detention has long been found to be a constitutionally permissible means to protect the public from a broad variety of dangers, ranging from foreign attack and

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[8] Every other court of appeals that has addressed the issue has disagreed with the court in this case and has upheld the constitutionality of the pretrial detention statute. See *United States* v. *Walker*, Nos. 86-5264 and 86-5272 (9th Cir. Nov. 5, 1986); *United States* v. *Rodriguez*, No. 86-5631 (11th Cir. Oct. 14, 1986); *United States* v. *Simpkins*, No. 86-3049 (D.C. Cir. Oct. 6, 1986); *United States* v. *Zannino*, 798 F.2d 544 (1st Cir. 1986); *United States* v. *Perry*, 788 F.2d 100 (3d Cir.), cert. denied, No. 86-5172 (Oct. 6, 1986); *United States* v. *Portes*, 786 F.2d 758 (7th Cir. 1985); *United States* v. *Accetturo*, 783 F.2d 382 (3d Cir. 1986). See also *United States* v. *Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982) (upholding the federal statute permitting pretrial detention in the District of Columbia).

civil insurrection to the outbreak of contagious disease. The Court has specifically recognized that regulatory detention is a proper means to protect society from the violent or threatening behavior of some of its members. For example, this Court has upheld against due process challenges the pretrial detention of potentially dangerous juveniles and potentially dangerous mentally incompetent defendants. The Court has also upheld detention, prior to deportation and exclusion, of potentially dangerous aliens. The Court's decisions upholding the detention of dangerous individuals in a variety of circumstances demonstrate the fallacy of the rigid position taken by the court of appeals—that criminally dangerous individuals can never be detained because of dangerousness prior to the moment of their conviction.

To the extent that it addressed those cases, the court of appeals suggested that they are exceptional and are distinguishable from the pretrial detention permitted by the Bail Reform Act. For example, the court of appeals distinguished this Court's recent decision in *Schall* v. *Martin*, 467 U.S. 253 (1984), on the ground that juveniles have a diminished interest in freedom from confinement. Closer examination reveals, however, that while this Court considered an individual's age as a relevant factor, the due process inquiry involved a balancing of the individual's liberty interest against the interests of the public in community safety. There is no suggestion in *Schall* that once the individual attains his majority, the community's interest in security must invariably be trumped by the individual's interest in freedom, regardless of the circumstances. In other cases as well, the Court has taken account of the individual's mental and emotional stability, as well as his citizenship status, in determining whether Congress has struck a permissible balance between individual liberty and public safety. In each case, however, the Court has indicated that an individual's threat to the public, standing alone, can provide a sufficient basis for deten-

tion. Contrary to the suggestion of the court of appeals, this Court's decisions regarding the detention of individuals because of dangerousness are simply specific examples of the general principle, embodied in history and practice, that Congress and the state legislatures have substantial latitude to protect the public safety through the detention of particularly dangerous individuals pending further judicial or administrative proceedings. The court of appeals' basic premise—that the Constitution imposes a blanket prohibition on such regulatory restraints—is fundamentally wrong.

C. If the government may in some instances protect the public safety through detention of dangerous persons, the question remains whether the regulatory restraint at issue in this case strikes a permissible balance between individual and community rights. That question entails two inquiries: first, whether the pretrial detention provisions serve a legitimate governmental objective; and second, whether the provisions specify adequate procedural safeguards to protect against an erroneous or unnecessary deprivation of liberty.

The pretrial detention provisions of the Bail Reform Act of 1984 are part of Congress's efforts, spanning 18 years, to establish coherent and fair standards for pretrial release. The provisions respond to the widely recognized and well documented need to protect the public from pretrial crime. Congress designed the pretrial detention provisions to reach a small but identifiable group of particularly dangerous defendants who demonstrate a clear propensity to commit serious crimes while awaiting trial. It expressly addressed the constitutional issues now before this Court and carefully restricted the scope of pretrial detention so as to strike a proper balance between the individual's interest in pretrial release and the government's duty to control crime. Sensitive to the defendant's interests in pretrial liberty, Congress designed these provisions to ensure that

the determination of dangerousness is made in a fair and open hearing, correcting the past practice of sub rosa detention of dangerous defendants through imposition of unattainably high financial conditions of release. The pretrial detention provisions protect the interests of both the criminal defendant and society through a candid and fair appraisal of the danger that the defendant poses to the public. They plainly advance a legitimate governmental objective.

Furthermore, Congress has incorporated into the statute a number of safeguards designed to protect the pretrial liberty interests of criminal defendants. Prior to any consideration of pretrial detention, a judicial officer must find that there is probable cause to believe that the defendant has committed the crime charged. Even then, pretrial detention typically may be invoked only in the case of certain defendants charged or previously convicted of certain serious crimes, and only if a judicial officer determines that no conditions of release can reasonably assure the safety of other persons and the community. The defendant's potential danger to the public is promptly determined in an adversarial proceeding where the defendant is afforded the right to counsel, the right to testify and call witnesses on his own behalf, and the right to cross-examine government witnesses. The government carries the heavy burden of demonstrating, through clear and convincing evidence, that no conditions of release will reasonably assure the public safety. The judicial officer must make an individualized judgment of dangerousness, based on criteria prescribed by statute. If the judicial officer elects to detain the defendant pending trial, he must provide a written explanation of his reasons for detention; that written explanation is then subject to expedited appellate review.

The concept of substantive due process, requiring that legislation strike a reasonable balance between the rights of the individual and the demands of organized society,

accords substantial respect to legislative judgment. That respect is plainly warranted here. Congress, which was clearly sensitive to the important interests at stake, crafted a statute that carefully balances the criminal defendant's pretrial liberty interests against the government's duty to protect the public from crime. The pretrial release provisions of the Bail Reform Act of 1984 satisfy the requirements of the Due Process Clause.

ARGUMENT

PRETRIAL DETENTION FOR DANGEROUSNESS UNDER SECTION 3142(e) OF THE BAIL REFORM ACT OF 1984 DOES NOT VIOLATE THE DUE PROCESS CLAUSE

A. The Due Process Clause Imposes Only a Limited Restriction on Congress's Exercise Of its Legislative Powers

This Court has repeatedly observed that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Walters* v. *National Ass'n of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 13; *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981); *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (separate opinion of Holmes, J.). The Court pays great respect to "the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters*, slip op. 13. This respect is particularly appropriate in the face of a substantive due process challenge to a federal statute. As Justice Jackson observed in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 222 (1953) (concurring in part and dissenting in part):

> After all, the pillars which support our liberties are the three branches of government, and the burden could not be carried by our own power alone. Substantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur, as to what is reasonable policy under particular times and circumstances.

Members of the Court have made the same point in more recent times, emphasizing that "the history of substantive due process 'counsels caution and restraint,' " *Regents of the University of Michigan* v. *Ewing*, No. 84-1273 (Dec. 12, 1985) (Powell, J., concurring), slip op. 1, quoting *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion), and that in determining whether legislation complies with the requirements of substantive due process, "we exercise limited and sharply restrained judgment." *Poe* v. *Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting). To be sure, there has been disagreement whether substantive due process is limited to those interests that are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrified," *Palko* v. *Connecticut*, 302 U.S. 319, 325, 326 (1937), or whether it extends to fundamental liberties not specified in the Constitution, but "deeply rooted in this Nation's history and tradition," *Moore* v. *City of East Cleveland*, 431 U.S. at 503 (plurality opinion). Under either standard, however, a substantive due process claim comes to this Court with a heavy burden of justification to bear. *Bowers* v. *Hardwick*, No. 85-140 (June 30, 1986), slip op. 8.

In this case, respondents' substantive due process claim has not met that burden. Contrary to the conclusion of the court of appeals, there is no absolute prohibition against the detention of dangerous persons as a regulatory measure to ensure public safety. And the Bail Reform Act of 1984 is carefully designed to balance the individual's interest in liberty against the government's interest in protecting the public safety. Accordingly, in the narrow circumstances prescribed by the Act, pretrial detention for dangerousness is constitutionally permissible.

B. The Government May Detain a Potentially Dangerous Person as a Regulatory Measure to Protect the Public Safety

The court of appeals' declaration that the Bail Reform Act is facially unconstitutional rests on the bold assertion

that " 'the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause' " (Pet. App. 16a (emphasis deleted)). The court quoted Judge Newman's separate opinion in *United States* v. *Melendez-Carrion*, 790 F.2d at 1001, to support that assertion. The court failed, however, to cite any binding authority from this Court. We submit that the Due Process Clause does not impose any such per se prohibition. To the contrary, the Due Process Clause has been interpreted to permit the government to restrict a person's physical freedom in the face of clear public need, provided that appropriate procedural safeguards are supplied to protect against unnecessary restrictions on liberty.

1. On numerous occasions, this Court has recognized the government's power to curtail an individual's liberty as a non-punitive regulatory measure to protect substantial public interests. Perhaps the clearest examples arise in times of war and civil disorder. The Court has upheld the President's unreviewable power under the Alien Enemies Act of 1798, ch. 58, 1 Stat. 570 *et seq.*, to detain and deport potentially dangerous aliens during times of war. See *Ludecke* v. *Watkins*, 335 U.S. 160 (1948). In a similar vein, the Court has upheld the government's power to subject American citizens to wartime curfews and relocation requirements. See *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943).[9] The Court has also recognized that the Governor

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[9] The restrictions at issue in those cases have since been criticized as resting on unwarranted racial characterizations. See, *e.g.*, Presidential Proclamation No. 4417, 3 C.F.R. 8 (1977) (describing the Japanese relocation program as "wrong" and a "national mistake[ ]"). However, no one would seriously contend that the government, in the face of a surprise foreign attack, would lack the power to detain suspected spies or saboteurs. Notably, the Constitution itself provides for suspension of the writ of habeas corpus when "in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9, Cl. 2.

of a State possesses broad powers to detain potentially dangerous persons in the event of an insurrection. See *Moyer* v. *Peabody,* 212 U.S. 78 (1909). As Justice Holmes observed in that case, due process "varies with the subject-matter and the necessities of the situation" (*id.* at 84) and may permit "temporary detention to prevent apprehended harm" (*id.* at 85).

The government's power to detain potentially dangerous persons is perhaps broadest during periods of armed conflict or civil insurrection.[10] But it is not limited to those extraordinary circumstances. For example, this Court has repeatedly recognized the government's power to employ regulatory detention in response to the recurring problems of an imperfect society, such as the control of sexual psychopaths and the dangerously insane. See, *e.g., Allen* v. *Illinois,* No. 85-5404 (July 1, 1986); *Addington* v. *Texas,* 441 U.S. 418 (1979); *Minnesota ex rel. Pearson* v. *Probate Court,* 309 U.S. 270 (1940). As the Court explained in the *Addington* case, "The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." 441 U.S. at 426.

The decisions cited above reflect the general principle that "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of

[10] Notably, in all of the cases cited above, the Court upheld the power of an Executive Branch official to impose, through summary proceedings, substantial limitations on an individual's personal liberty. The Bail Reform Act of 1984, by contrast, requires that a judicial officer determine pretrial detention issues subject to legislatively prescribed standards and further judicial review.

the general public may demand." *Jacobson* v. *Massachusetts,* 197 U.S. 11, 29 (1905). In *Jacobson,* Justice Harlan cited quarantine laws, subjecting persons to temporary detention for health reasons, as another familiar example of the principle (*ibid.*). This Court has long recognized that quarantine laws are well within the government's police powers. See, *e.g., Compagnie Francaise de Navigation a Vapeur* v. *Louisiana State Board of Health,* 186 U.S. 380, 387 (1902); *Morgan's Steamship Co.* v. *Louisiana Board of Health,* 118 U.S. 455, 460 (1886).

Immigration laws, providing for temporary detention of foreign citizens pending determination of their right to enter this country, provide yet another example of the general principle that regulatory detention is a permissible means of advancing important public interests. In the immigration setting, this Court has upheld the indefinite detention of a resident alien pending an exclusion hearing. *Shaughnessy* v. *United States ex rel. Mezei, supra.* Similarly, non-resident aliens are subject to detention pending determination of their immigration status. *Wong Wing* v. *United States,* 163 U.S. 228 (1896); *Nishimura Ekiu* v. *United States,* 142 U.S. 651, 662-664 (1892). This Court stated in *Wong Wing* (163 U.S. at 235):

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.

More recently, in *Carlson* v. *Landon,* 342 U.S. 524 (1952), the Court reaffirmed the principles of *Wong Wing,*

holding that it is constitutionally permissible to detain a potentially dangerous resident alien pending deportation proceedings against him. 342 U.S. at 537-542.

The circumstances in which the Court has upheld the detention of dangerous individuals are not limited to civil proceedings. In criminal cases, the Court has permitted the temporary pretrial detention of dangerous defendants in several different settings. For example, the Court has held that there is no constitutional bar to the pretrial detention of potentially dangerous persons who are found to be incompetent to stand trial. *Greenwood* v. *United States,* 350 U.S. 366 (1956). Where the defendant has come "legally into the custody of the United States" through the power to prosecute for federal offenses, and where the district court has found that the defendant is incompetent to stand trial and would be dangerous if released, his commitment, and the legislation authorizing it, "involve an assertion of authority, duly guarded, auxiliary to incontestable national power." 350 U.S. at 375. If the incompetent individual ceases to be dangerous, he must be released; and if it becomes clear that he will never become competent to stand trial, the government must proceed by civil commitment if it wishes to continue to hold him. See *Jackson* v. *Indiana,* 406 U.S. 715, 731-739 (1972). But while the prospect of a trial is a realistic one, and while the defendant remains dangerous, detention is constitutionally permissible. 406 U.S. at 738.

Similarly, in *Schall* v. *Martin,* 467 U.S. 253 (1984), the Court upheld the pretrial detention of juveniles charged with criminal offenses. Rejecting arguments that due process flatly forbids pretrial detention on dangerousness grounds, the Court found that the New York statute served a legitimate regulatory purpose that was compatible with the "fundamental fairness" required by the Due Process Clause. 467 U.S. at 268. The Court pointed out that the New York law "serves the legitimate state objective,

held in common with every State in the country, of protecting both the juvenile and society from the hazards of pretrial crime" (*id.* at 274). The state's interest in community safety, the Court noted, is substantial (*id.* at 264):

> The "legitimate and compelling state interest" in protecting the community from crime cannot be doubted. *De Veau* v. *Braisted,* 363 U.S. 144, 155 (1960). We have stressed before that crime prevention is a "weighty social objective," *Brown* v. *Texas,* 443 U.S. 47, 52 (1979), and this interest persists undiluted in the juvenile context.

On the other side of the balance, the Court pointed out that New York's pretrial detention statute contained procedural provisions that afforded the defendants significant protections against erroneous and unnecessary deprivations of liberty. In light of the substantiality of the public interest and the protections for the individuals' liberty interest, the Court found the New York statutory scheme to be a permissible exercise of the State's regulatory power.

Finally, as the Court observed in the *Wong Wing* case, 163 U.S. at 235, regulatory detention for reasons other than dangerousness to society at large is a familiar and accepted element of the criminal justice system. It is an accepted feature of criminal practice that a criminal suspect may be detained for the period required to complete the proceedings relating to his arrest (*Gerstein* v. *Pugh,* 420 U.S. 103, 113-114 (1975)); that he may be detained for lengthy periods in order to ensure his appearance at trial (*Bell* v. *Wolfish,* 441 U.S. 520, 534 (1979)); and that he may be detained to protect jurors and witnesses from harm (*Carbo* v. *United States,* 82 S.Ct. 662 (1962) (Douglas, Circuit Justice)). If the government can detain criminal suspects for such administrative and regulatory purposes in connection with criminal proceedings, it is

hard to understand why it should not also be permitted to protect the public at large by detaining a defendant who is likely to engage in pretrial crime.

The pretrial detention statute does not grant federal courts a roving commission to ferret out dangerous individuals wherever they may be found. Rather, the inquiry into dangerousness is triggered only when the individual comes within the court's jurisdiction after being charged with a serious criminal offense. In this respect, the respondents' detention in this case is akin to the detention of the indicted but incompetent defendant in *Greenwood* v. *United States, supra,* the indicted pretrial detainees in *Bell* v. *Wolfish, supra,* and the detained arrestees in *Gerstein* v. *Pugh, supra.* In each instance, it was a charge of criminal conduct that brought the defendants within the jurisdiction of the court; the detention was not an end in itself, but was merely ancillary to the criminal case. Thus, it is reasonable for Congress to impose on the courts an obligation not to release highly dangerous offenders who have been brought before the courts on criminal charges, even if it would not be reasonable for Congress to authorize the apprehension and detention of members of the general public on dangerousness grounds.

2. Despite the formidable body of precedent authorizing various forms of detention for dangerousness in civil and criminal settings, the court of appeals maintained—without citation of authority—that detention of a criminal defendant for the purpose of preventing pretrial criminal activity "conflicts with fundamental principles of our constitutional system of criminal justice" (Pet. App. 20a). The court of appeals did acknowledge (*id.* at 14a) that pretrial detention is permissible if a defendant poses a risk of flight or threatens the trial process, but it suggested that pretrial detention to prevent future criminal acts is distinguishable (*id.* at 15a-20a). The court dismissed *Schall* as an exceptional case, stating that juveniles "have an interest in

liberty less substantia' than adults" (*id.* at 21a-22a). The court's reasoning does not withstand analysis.

The court of appeals stated that pretrial detention may be employed to prevent flight or interference with the judicial process, because " 'the Constitution's scheme for a system of criminal justice specifies that arrest is to be followed by trial and plainly implies that reasonable steps may be taken to ensure that the trial will take place' " (Pet. App. 19a (quoting *Melendez-Carrion,* 790 F.2d at 1002 (opinion of Newman, J.)). But as the Court in *Schall* recognized, the government also has a " 'legitimate and compelling state interest' " in preventing crime (467 U.S. at 264). The government's interest in preventing crime is no less substantial than the government's interest in protecting the judicial process that *serves* that goal. The court of appeals failed to provide a satisfactory explanation why pretrial detention cannot be employed to advance both of those related interests.

Relying on Judge Newman's reasoning in *Melendez-Carrion,* the court of appeals suggested that the use of pretrial detention rests on a " 'fallacy' " that emerges by considering the detention of persons who have never been accused of any crime and those who have previously been convicted and have served their sentences (Pet. App. 15a). The court stated that the Due Process Clause would never permit the detention of persons in the latter group, even though they might, as " 'a matter of probabilities,' " pose a greater danger to society than those simply accused of crime (*id.* at 16a-17a). Due process, the court concluded, " 'must accord similar protection to a person not convicted but only accused of a crime' " (*id.* at 17a) to rectify this "anomaly" (*id.* at 18a).

The court's basic premise was wrong; this Court has repeatedly approved detention of dangerous persons who have not been charged with a crime where the circum-

stances demanded that action. See *Shaugnessy* v. *United States ex rel. Mezei,* 345 U.S. 206 (1953); *Moyer,* 212 U.S. at 84-85. As Justice Jackson noted, this concept of due process is not "so paralyzing that it forbids all detention of an alien as a preventive measure against threatened dangers and makes confinement lawful only after the injuries have been suffered." *Mezei,* 345 U.S. at 223 (Jackson, J., concurring in part and dissenting in part); see also *Moyer,* 212 U.S. at 85 ("Public danger warrants the substitution of executive process for judicial process.") (Holmes, J.).

The reason that persons who have served their sentences are not subject to detention (at least until they are charged with another criminal offense) is that society has made the judgment that after a period of incarceration, those persons no longer pose an unacceptable risk of endangering the community. That societal judgment is made through the combined effort of the legislature, in selecting a penalty for the crime; the sentencing judge, in selecting an appropriate sentence; and the parole authorities, in deciding when the individual is prepared for his release into the community. If the judgment is made that a particular class of offenders—or even a particular individual—poses an unacceptable risk of danger to the community, society can respond to that determination by setting an appropriate sentence in the first instance and then adjusting the defendant's release date thereafter. Because those devices are not available in the case of dangerous persons who have been charged with a crime, but have not yet been tried, convicted, and sentenced, society must look to pretrial detention as a means of protecting itself from persons in that group.

Perhaps the most striking feature of the court of appeals' reasoning is the anomaly created by the court's recognition of the circumstances in which pretrial detention is clearly permissible. Under the court's approach, a

judicial officer could detain an alleged street criminal who threatens a judge, juror, or witness, but it would have to release an avowed terrorist who—for example, through threats to bomb an airliner (Pet. App. 20a)—"merely" intends to harm the President, a congressman, or the public at large. The court of appeals would allow a judge to employ pretrial detention to protect his courtroom, but not to protect the innocent public that he serves. Thus, under the court's analysis, a district court could detain the defendant to ensure his prompt appearance for court hearings, but not to prevent him from engaging in the most violent and destructive crimes. We know of no constitutional principle that would compel a legislature to draw such an unappealing distinction.

The court of appeals made only brief mention of this Court's opinion in *Schall* v. *Martin, supra,* which the court sought to distinguish on the ground that it involved the detention of juveniles. Adults cannot be detained under the rationale of *Schall,* the court reasoned, because they have a more substantial interest in pretrial liberty than juveniles, who " 'are always in some form of custody' " (Pet. App. 21a-22a (quoting *Schall,* 467 U.S. at 265)). That observation is not sufficient to justify a different result under a substantive due process analysis. *Schall* indicates that the due process inquiry requires a weighing of the governmental and individual interests. As Judge Feinberg suggested (Pet. App. 25a), the government's interest in detaining adults is certainly greater than its interest in detaining juveniles. Adults commit far more crimes than juveniles (see, *e.g., Schall,* 467 U.S. at 265 n.14) and "may have superior access to the means of committing more serious and far-reaching offenses" (Pet. App. 25a (Feinberg, J., dissenting)).[11] It is far from clear, on the

[11] The facts in this case certainly bear out that observation. Respondents' alleged criminal activities, involving murder for hire, extortion, and supervision of racketeering enterprises, are in no sense child's play.

other side of the balance, that an adult's interest in pretrial release is significantly greater than the juvenile's "undoubtedly substantial" interest. See *In re Winship*, 397 U.S. 358, 365-368 (1970); *id.* at 373-374 (Harlan, J., concurring); *In re Gault*, 387 U.S. 1, 25-27 (1967). It is certainly wrong to conclude that an adult's emancipation from parental control vests him with absolute immunity from pretrial detention, regardless of the extent of the public interest in community safety.[12]

Schall and this Court's other decisions authorizing regulatory detention are not, as the court of appeals suggested, exceptional. Instead, they are simply specific examples of the general principle, embodied in history and

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[12] The court of appeals did not discuss this Court's other decisions, cited above, that permit detention of dangerous persons in a wide range of contexts. In *Melendez-Carrion*, Judge Newman attempted to distinguish those cases dealing with the mentally ill, stating that "[d]etention to prevent dangerous conduct may also be imposed upon those who lack the capacity to be fully accountable for their actions" (790 F.2d at 1003). However, this Court's decisions indicate that it is the mentally ill person's dangerous propensities, rather than his mental disability, that provides the primary justification for detention. See *O'Connor* v. *Donaldson*, 422 U.S. 563, 576 (1975) (holding that confinement of a non-dangerous mentally ill person violates due process). See also *id.* at 582-583 (Burger, C.J., concurring) ("There can be little doubt that in the exercise of its police power, a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.").

In any event, Judge Newman's distinction cannot be reconciled with this Court's decisions authorizing detention of mentally competent dangerous individuals. See *e.g.*, *Shaughnessy* v. *United States ex rel. Mezei*, *supra*; *Carlson* v. *Landon*, *supra*; *Moyer* v. *Peabody*, *supra*. His distinction, permitting the detention of persons who unwittingly or unwillingly engage in crime, but requiring a court to release intentionally vicious defendants, produces a senseless result. The government has a particular interest in preventing the fully deliberated crimes of professional criminals. And the professional criminal does not have an unfettered liberty interest in the exercise of his conscious right of "free choice" to victimize society through crime.

practice, that Congress and state legislatures have substantial latitude to protect the public safety through detention of particularly dangerous individuals pending further judicial or administrative proceedings. Those cases demonstrate that the question whether due process will permit regulatory detention in a particular situation cannot be answered by the invocation of constitutional absolutes. Instead, the determination requires a weighing of the governmental and individual interests in light of the available procedural safeguards. *Schall*, 467 U.S. at 263-264. In the following section, we apply the analysis employed in *Schall* to the Bail Reform Act of 1984.

C. The Bail Reform Act of 1984 Strikes a Proper Balance Between a Criminal Defendant's Interest in Pretrial Liberty and the Government's Duty to Prevent Crime

If substantive due process principles do not forbid pretrial detention in every case, the question is whether the Bail Reform Act of 1984 strikes a reasonable balance between a criminal defendant's interest in pretrial liberty and the government's duty to control crime. As *Schall* v. *Martin, supra,* explains, that question entails two distinct inquiries: first, whether the pretrial detention provisions serve a legitimate governmental objective; and second, whether the procedural safeguards accompanying those provisions adequately protect against erroneous deprivations of liberty. 467 U.S. at 263-264.[13]

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[13] In *Schall,* this Court also considered whether pretrial detention was punitive rather than regulatory. The Court ultimately rejected the lower courts' determination that the detention in question resulted in punishment. 467 U.S. at 269-274. That issue is not present in this case. The court of appeals held here that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a *regulatory measure*" (Pet. App. 14a (emphasis added)). See also *United States* v. *Melendez-Carrion,* 790 F.2d at 1000 (separate opinion of Newman, J.) ("A predominant regulatory purpose of section

1. As we have already observed, "[t]he 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted." *Schall,* 467 U.S. at 264. Congress carefully crafted the pretrial detention provisions at issue here to serve that interest, striking a reasonable balance between the government's duty to control crime and the criminal defendant's substantial interest in pretrial liberty. The legislative history of the Bail Reform Act of 1984 reveals that Congress applied painstaking care and deliberation in formulating the pretrial detention provisions. Those provisions are not " 'arbitrary impositions' " or " 'purposeless restraints' " (*Moore,* 431 U.S. at 502 (quoting *Poe,* 367 U.S. at 543 (Harlan, J., dissenting)). Instead, they advance both the public's interest in preventing pretrial crime and the criminal defendant's interest in fair and candid consideration of appropriate conditions for pretrial release.

The pretrial detention provisions are part of Congress's 18-year effort, initiated by the Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 *et seq.*, to establish coherent and fair standards for pretrial release. Prior to that Act, the federal courts placed almost exclusive reliance on financial requirements, such as bail bonds, to condition pretrial release. See 18 U.S.C. (1964 ed.) 3141.[14]

3142(e) has been widely identified." (citing cases)). Thus, the court of appeals acknowledged that the pretrial detention provisions of the Bail Reform Act serve a regulatory, not a punitive, function. See generally *Bell* v. *Wolfish,* 441 U.S. 520, 535-539 (1979).

[14] Notably, both federal and state courts in this country have traditionally been empowered to restrain dangerous persons through the venerable common law remedy, described by Blackstone, of "holding to security of the peace." 4 W. Blackstone, *Commentaries* *248-252. That remedy, permitting a court to detain a person likely to engage in criminal behavior unless that person posts a "peace bond," has been widely codified in the United States. See 18 U.S.C. 3043 (repealed by the Bail Reform Act of 1984, Pub. L. No. 98-473, § 204(c), 98 Stat. 1986); Cal. Penal Code §§ 701 *et seq.* (1985); N.H. Rev. Stat. Ann.

Congress grew concerned by the inequities of that practice, recognizing (H.R. Rep. 1541, 89th Cong., 2d Sess. 8-9 (1966)) that "[t]he rich man and the professional criminal readily raise bail regardless of the amount[.] But it is the poor man, lacking sufficient funds, who remains incarcerated prior to trial."

Congress passed the Bail Reform Act of 1966 to remedy the "evils which are inherent in a system predicated solely upon monetary bail" (H.R. Rep. 1541, *supra,* at 9). The statute sought to achieve that end by requiring that the courts release defendants on personal recognizance or unsecured bond unless the court determines "such a release will not reasonably assure the appearance of the person as required" (18 U.S.C. (Supp. II 1966) 3146(a)). The Act further specified that, if other conditions were required, the court should rely, to the extent possible, on non-monetary conditions of release (*ibid.*).

The Bail Reform Act of 1966 made no provision for considering dangerousness in the course of pretrial release for non-capital crimes. The congressional committees that drafted the Act recognized that preventive detention "is intimately related to the bail reform problem" but decided that "the need for reform of existing bail procedures is so pressing that such reform should not be delayed with the

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§ 608 (1974); Tex. Crim. Proc. Code Ann. § 7.02 (1977). Early state court decisions suggest that judicial officers used these common law remedies with great frequency. See, *e.g., Respublica* v. *Donagan,* 2 Yeates 437 (Pa. 1799) (affirming security of the peace and good behavior bond set after defendant acquitted of murder charge); *Commonwealth* v. *Ward,* 4 Mass. 496 (1808); *Key* v. *Commonwealth,* 6 Ky. 495 (1814); *Commonwealth* v. *Bartlett,* 28 Va. 456 (1829); *State* v. *Mills,* 13 N.C. 555 (1830); see also *United States* v. *Grenier,* 26 F. Cas. 36 (E.D. Pa. 1822) (No. 15,262) (peace bond imposed on an individual who had participated in Georgia's rebellion against the United States government). In addition, as we note in the text, it is commonly acknowledged that the courts historically detained dangerous defendants prior to trial through the practice of imposing unattainably high financial conditions of release.

hope of enacting more comprehensive legislation * * *." S. Rep. 750, 89th Cong., 1st Sess. 5 (1965); see also H.R. Rep. 1541, *supra,* at 6 (pretrial detention based on dangerousness "involves many difficult and complex problems which require deep study and analysis").[15]

The close relationship between financial conditions of release and preventive detention resurfaced four years later, when Congress considered the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 155(c), 84 Stat. 570. That legislation comprehensively addressed the "almost complete failure of the law enforcement machinery" within the District of Columbia. See H.R. Rep. 91-907, 91st Cong., 2d Sess. 14 (1970). The House Committee on the District of Columbia concluded that the Bail Reform Act of 1966, which applied to the District of Columbia, had contributed to that failure. It observed that prior to that Act, federal courts, as a matter of engrained practice, had regularly detained dangerous persons through the use of high monetary bond (*id.* at 83). The Committee stated (*ibid.*):

> This sham frequently served the purpose of protecting the community from dangerous defendants, but it also imprisoned people who posed no threat. When the issue of dangerousness silently appeared, there were no set standards or due process safeguards to protect the defendant under suspicion; and since there was no visible determination of dangerousness, there was little or nothing for a court to review.

The Committee noted that the Bail Reform Act of 1966, by addressing only part of this phenomenon, had placed

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[15] Congress did specify that the courts should take a defendant's dangerousness into account when considering pretrial release in capital cases and when considering release pending sentencing or appeal. 18 U.S.C. (Supp. II 1966) 3148.

federal judges in a dilemma. The Committee stated (*id.* at 84-85 (emphasis in original)):

> In striving to eliminate money as a barrier to release, the 1966 legislation was a great step forward, which more than justified its label of reform. At the same time, however, *by totally eliminating dangerousness as a criterion to be considered in setting conditions for pretrial release, the Bail Reform Act ignored the rationale behind 700 years of legal practice.* Today, Federal judges are faced with an agonizing decision when an obviously dangerous defendant stands before them. They must either disregard the compelling mandate behind the new law by setting bail beyond the defendant's means, or they must shut their eyes to community danger. One course perpetuates hypocrisy; the other course is irrational.

The Committee noted the District of Columbia's "devastating experience under the Bail Reform Act of 1966" (*id.* at 87), citing hearing testimony, crime surveys, grand jury investigations, and presidential and judicial reports indicating that released defendants frequently committed crimes while on pretrial release (*id.* at 82-83, 89-90 94-104).[16]

The Committee responded to the "disastrous effect" (H.R. Rep. 91-907, *supra*, at 88) of indiscriminate pretrial release by recommending pretrial detention of criminal

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[16] See *Bail Reforms, Stop and Search, Pretrial Detention, Crimes of Violence, and Juvenile Code: Hearings on H.R. 14334 et al. Before Subcomm. No. 3 of the House Comm. on the District of Columbia,* 91st Cong., 1st Sess. (1969); *Anti-Crime Proposals: Supplement to Hearings on H.R. 14334 et al. Before Subcomm. No. 3 of the House Comm. on the District of Columbia,* 91st Cong., 1st Sess. (1970); see also *Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess. (1970); *Amendments to the Bail Reform Act of 1966: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. (1969).

defendants within the District of Columbia "in certain limited circumstances" (*id.* at 91). It carefully considered the constitutionality of this action (*id.* at 91-93), and drafted provisions that incorporated procedural safeguards "far above the minimum required by due process" (*id.* at 93). Congress concurred in the Committee's recommendations and enacted a federal pretrial detention statute applicable within the District of Columbia. See D.C. Code Ann. § 23-1322 (1981 & Supp. 1985)). The District of Columbia Court of Appeals subsequently upheld the statute against constitutional challenge. *United States* v. *Edwards,* 430 A.2d 1321 (D.C. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982).

Congress, meanwhile, continued to consider whether to enact pretrial detention provisions applicable throughout the federal court system.[17] These efforts culminated in the Bail Reform Act of 1984. After exhaustively examining the public and private interests at stake, Congress provided general authority for the federal courts to employ pretrial detention in appropriate circumstances. The provisions of that Act, and the legislative record supporting

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[17] See, *e.g.*, S. Rep. 98-147, 98th Cong., 1st. Sess. (1983); S. Rep. 97-317, 97th Cong., 2d Sess. (1982); S. Rep. 97-307, 97th Cong., 1st Sess. 1147-1176 (1981); *Bail Reform: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. (1981); *Bail Reform Act – 1981-1982: Hearings on H.R. 3006 et al. Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 97th Cong., 1st & 2d Sess. (1981-1982); *The Global Connection: Heroin Entrepreneurs, Hearings on the Narcotic Sentencing and Seizure Act of 1976 (S. 3411 and S. 3645) Before the Subcomm. to Investigate Juvenile Delinquency of the Comm. on the Judiciary,* 94th Cong., 2d Sess. (1976); see also *Pretrial Release or Detention: Hearings and Markups of H.R. 13403 et al. Before the Subcomm. on the Judiciary of the House Comm. on the District of Columbia,* 94th Cong., 2d Sess. (1976).

them, affirm that Congress struck a proper balance between the government's duty to control crime and the criminal defendant's interest in pretrial liberty.

The Senate Committee on the Judiciary—like the House Committee on the District of Columbia 14 years earlier—concluded that "Federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give the appropriate recognition to the danger a person may pose to others if released." S. Rep. 98-225, 98th Cong., 1st Sess. 3 (1983). The Committee cited the widespread consensus, shared by the President, the Chief Justice, the Attorney General, the American Bar Association, and other national organizations, that the Bail Reform Act of 1966 had failed "to recognize the problem of crimes committed by those on pretrial release" (*id.* at 5-6). It noted that "this broad base of support for giving judges the authority to weigh risks to community safety in pretrial release decisions is a reflection of the deep public concern, which the Committee shares, about the growing problem of crimes committed by persons on release" (*id.* at 6).

The Senate Committee found that "[t]he disturbing rate of recidivism" fully justified these concerns, citing studies documenting the problem of pretrial criminality (S. Rep. 98-225, *supra,* at 6). The Committee, which had held extensive hearings on preventive detention (*id.* at 5 n.4), concluded (*id.* at 6-7):

> [T]here is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial.

The Senate Committee acknowledged that a criminal defendant has an important interest in pretrial liberty, but concluded that "[w]here there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate" (S. Rep. 98-225, *supra,* at 7). The Committee ultimately determined, based on its own constitutional analysis and the experience gained under the District of Columbia's preventive detention provisions, that "pretrial detention is not *per se* unconstitutional" (*id.* at 8). The Committee nevertheless formulated the preventive detention provisions with care, observing that "a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect" (*ibid.*).[18]

Finally, the Committee concluded that statutory authorization of pretrial detention would ultimately protect the legitimate interests of defendants (S. Rep. 98-225, *supra,* at 11). The Committee acknowledged the evidence—identified in previous congressional reports—that courts regularly detained defendants perceived as dangerous through the sub rosa method of imposing extremely high monetary conditions (*id.* at 10-11). It suggested that "[p]roviding statutory authority to conduct a hearing focusing on the issue of a defendant's dangerousness, and to permit an order of detention where a defendant poses such a risk to others that no form of conditional release is

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[18] The elaborate procedural safeguards embodied in Section 3142, which we discuss in detail at pages 35-39, *infra,* "were carefully drafted with these concerns in mind" (S. Rep. 98-225, *supra,* at 8). They reflect the wisdom gained through formulation of the District of Columbia's preventive detention provisions, which experience had demonstrated were workable in practice (*id.* at 8-9).

sufficient, would allow the courts to address the issue of pretrial criminality honestly and effectively" (*id.* at 11). The committee added (*ibid.*):

> It would also be fairer to the defendant than the indirect method of achieving detention through the imposition of financial conditions beyond his reach. The defendant would be fully informed of the issue before the court, the government would be required to come forward with information to support a finding of dangerousness, and the defendant would be given an opportunity to respond directly. The new bail procedures promote candor, fairness, and effectiveness for society, the victims of crime—and the defendant as well.

In short, Congress carefully weighed the government's interest in preventing crime against the defendant's interest in pretrial liberty and struck a balance that benefits both interests. Acting in response to widely acknowledged and documented public need, Congress provided the courts with express power to detain defendants who pose a serious danger to the community. Furthermore, it established a systematic and open procedure for assessing pretrial dangerousness, eliminating the past objectionable practices of detaining dangerous defendants by imposition of unattainable financial conditions. Through these efforts, Congress completed the process, initiated 18 years earlier under the Bail Reform Act of 1966, of establishing coherent and fair standards and procedures to guide the courts in making pretrial release decisions. The pretrial detention provisions, whether viewed in isolation or in the context of broad-scale bail reform, plainly serve a legitimate governmental objective.

2. The question remains whether the procedural protections embodied in the pretrial detention provisions provide "sufficient protection against erroneous and unnecessary deprivations of liberty" (*Schall,* 467 U.S. at 274) to ensure

the constitutionality of the federal pretrial detention statute. An examination of those protections confirms that they meet constitutional standards.[19]

As a threshold matter, the Bail Reform Act of 1984 is consistent with this Court's holding that a judicial determination of probable cause is a prerequisite to any extended restraint on the liberty of an adult accused of crime. See *Gerstein* v. *Pugh,* 420 U.S. at 114; accord *Schall,* 467 U.S. at 274-275. As the Senate report explains (S. Rep. 98-225, *supra,* at 18 n.57), in a case in which the defendant has not already been indicted, the Federal Rules of Criminal Procedure require a judicial officer to determine, either prior to or at the time of a suspect's initial appearance, whether there is probable cause to believe that the defendant has committed the crime charged. See Fed. R. Crim. P. 4(a), 5(a). Thus, probable cause must be established prior to any consideration of pretrial detention.

The Bail Reform Act's provisions impose additional limitations on the use of pretrial detention. For example, pretrial detention may be employed only in certain prescribed circumstances. As previously noted (pages 3-4, *supra*), the pretrial detention provisions typically can be invoked only against defendants who (1) have been charged with a violent or capital crime; (2) have been charged with a serious drug-related offense; or (3) have previously been convicted of such crimes. 18 U.S.C. (Supp. II) 3142(f). Furthermore, pretrial detention may be employed only if "after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure * * * the safety of any other person and the community" (18 U.S.C.

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[19] The court of appeals, concluding that pretrial detention would violate due process no matter how extensive the procedural protections (Pet. App. 16a), found no need to address this question.

(Supp. II) 3142(e)).[20] Pretrial detention thus can be considered only as a last resort, after the judicial officer has considered every feasible alternative and has expressly rejected each of them.

Section 3142(f), which governs the pretrial detention hearing, further protects the defendant's pretrial liberty interest through rigorous procedural safeguards. First, the detention decision must be made promptly. Once the government has moved for pretrial detention, an adversarial hearing must be held "immediately upon the defendant's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance" (18 U.S.C. (Supp. II) 3142(f)). The defendant may seek a continuance of up to five days; a longer continuance can be granted on a showing of good cause (*ibid.*). The government may not seek a continuance of longer than three days, except for good cause (*ibid.*). In addition, the defendant is entitled to a full adversary hearing on the detention question. The defendant has the right to be represented by counsel at the hearing, and is entitled to court-appointed counsel if he is financially unable to obtain adequate representation (*ibid.*). The defendant may testify and present witnesses on his own behalf, he may cross-examine government witnesses, and he may present evidence by proffer (*ibid.*).

At the hearing, the government carries the burden of demonstrating that the defendant poses a serious threat to public safety. Section 3142(f) imposes a stringent standard of proof, stating (18 U.S.C. (Supp. II) 3142(f)):

> The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety

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[20] Section 3142(c) provides a list of 13 conditions that may be utilized, in addition to "any other condition that is reasonably necessary * * * to assure the safety of any other person and the community." 18 U.S.C. (Supp. II) 3142(c).

> of any other person and the community shall be supported by clear and convincing evidence.

The "clear and convincing" evidentiary standard is, of course, the same demanding test that is applied to civil proceedings for the indefinite commitment of the mentally ill (*Addington* v. *Texas*, 441 U.S. 418 (1979)), and for deportation (*Woodby* v. *INS*, 385 U.S. 276 (1966)), denaturalization (*Chaunt* v. *United States*, 364 U.S. 350 (1960)), and expatriation (*Gonzales* v. *Landon*, 350 U.S. 920 (1955) (per curiam)).

The judicial officer must make an individualized judgment of dangerousness, based on criteria prescribed by statute. 18 U.S.C. (Supp. II) 3142(g). Those criteria include: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger that would be posed by his release. *Ibid.* If the judicial officer elects to detain the defendant pending trial, he must provide a written explanation of his reasons for detention. 18 U.S.C. (Supp. II) 3142(i). The order must include written findings of fact and a statement of reasons for the detention, it must provide that the person detained be separated to the extent practicable from persons awaiting or serving sentences, and it must direct that the person be afforded a reasonable opportunity for private consultation with his lawyer and be made available for necessary court appearances (*ibid.*). A judicial officer's decision to detain the defendant is subject to expedited judicial review. See 18 U.S.C. (Supp. II) 3145(b) and (c).

As this discussion demonstrates, the pretrial detention provisions of the Bail Reform Act provide extensive substantive and procedural protection to the liberty interests of criminal defendants. They limit the use of pretrial detention to defendants likely to be particularly dangerous, they require a judicial finding—supported by

clear and convincing evidence—that no release conditions can reasonably protect the community, and they provide extensive procedural protections to ensure that the defendant's dangerousness is promptly and accurately assessed. These procedures, like those employed in *Schall,* are constitutionally adequate. There are simply no "additional procedures that would significantly improve the accuracy of the determination without unduly impinging on the achievement of legitimate state purposes" (*Schall,* 467 U.S. at 277 (footnote omitted)).[21]

3. As the foregoing discussion demonstrates, the pretrial detention provisions of the Bail Reform Act of 1984 were not the product of impulse, insensitivity, or whim. The provisions were the culmination of an 18-year congressional effort to improve the Nation's bail procedures for the benefit of both the general public and the criminal defendant. Congress, sensitive to the important interests at stake, carefully crafted the provisions to strike a reasonable balance between the government's duty to control crime and the criminal defendant's pretrial liberty interests, incorporating exacting procedural protections to minimize the possibility of erroneous or unnecessary

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[21] The safeguards employed here are more extensive than those that met this Court's approval in *Schall.* Furthermore, they answer many of the concerns expressed by the dissenting opinion in *Schall* (467 U.S. 281 (Marshall, J., dissenting)). The dissenting opinion noted that the juvenile detention procedures did not require a preliminary finding of probable cause, they applied to all juveniles regardless of their prior records and the severity of the offenses charged, and they did not provide for an assessment of the likelihood or seriousness of future criminal conduct (*id.* at 283). As our discussion above demonstrates, the Bail Reform Act of 1984 addresses each of those concerns. The dissenting opinion gave particular emphasis to the absence of statutory guidance concerning the type of evidence that would be considered in assessing dangerousness and the standard of proof that would be employed (*id.* at 302-303). As noted above, the Bail Reform Act of 1984 sets forth specific criteria for assessing dangerousness and imposes a "clear and convincing" standard of proof.

deprivations of liberty. The provisions were designed in light of the experience gained under the District of Columbia's pretrial detention statute, a prototype enactment that provided a "useful reference" (S. Rep. 98-225, *supra,* at 8) in drafting national legislation.

Congress's judgment has received broad judicial approval throughout the federal courts. Six circuits have expressly rejected due process challenges to the Bail Reform Act's preventive detention provisions. See *United States* v. *Walker,* Nos. 86-5264 and 86-5272 (9th Cir. Nov. 5, 1986) (per curiam order; opinion to be filed); *United States* v. *Rodriguez,* No. 86-5631 (11th Cir. Oct. 14, 1986); *United States* v. *Simpkins,* No. 86-3049 (D.C. Cir. Oct. 6, 1986) (per curiam order; opinion to be filed); *United States* v. *Zannino,* 798 F.2d 544, 546-547 (1st Cir. 1986); *United States* v. *Perry,* 788 F.2d 100, 112-113 (3d Cir.), cert. denied, No. 86-5172 (Oct. 6, 1986); *United States* v. *Portes,* 786 F.2d 758, 767 (7th Cir. 1985). In addition, a number of district courts have also rejected due process challenges to the pretrial detention provisions at issue in this case. See, *e.g., United States* v. *Accetturo,* 623 F. Supp. 746, 762-766 (D.N.J. 1985), aff'd, 783 F.2d 382 (3d Cir. 1986); *United States* v. *Freitas,* 602 F. Supp. 1283, 1290-1291 (N.D. Cal. 1985); *United States* v. *Acevedo-Ramos,* 600 F. Supp. 501, 505-507 (D.P.R. 1984), aff'd, 755 F.2d 203 (1st Cir. 1985); *United States* v. *Hazzard,* 598 F. Supp. 1442, 1450-1452 (N.D. Ill. 1984).

The judgment of Congress also finds support in the similar enactments of a number of state legislatures. Following the District of Columbia Court of Appeals' decision in *United States* v. *Edwards, supra,* upholding the constitutionality of the District's pretrial detention provisions, five states have amended their constitutions or have passed statutes to permit pretrial detention based on a finding of danger to the community. See Ariz. Const. Art. 2, § 22(3); Ariz. Rev. Stat. Ann. § 13-3961B (Supp. 1985);

Cal. Const. Art. I, § 12(b); Colo. Const. Art. II, § 19(b); Fla. Const. Art, I, § 14; Fla. Stat. Ann. § 907.041(4) (1985); Va. Code Ann. § 19.2-120(2) (1983).[22]

In sum, Congress has reached a reasoned judgment—broadly supported by the Executive Branch, the lower federal courts, and a number of states—that pretrial detention, under the circumstances prescribed by the Bail Reform Act of 1984, is consistent with due process. That judgment, reflecting the Nation's consensus that pretrial detention comports with "fundamental fairness," merits great respect.

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[22] In addition, 11 other states have authorized pretrial detention when the defendant is accused of committing, or has been previously convicted of, certain serious non-capital crimes. See Ga. Code Ann. § 17-6-1(b)(1)-(2) (Supp. 1968); Haw. Rev. Stat. § 804-3(b)(2) (Supp. 1984); Ill. Rev. Stat. ch. 38, para. 110-4(a) (1980); Mich. Const. Art I, § 15(a); Neb. Const. Art. 1, § 9; Nev. Rev. Stat. § 178.486 (1967); N.M. Const. Art. II, § 13A; Ore. Const. Art. I, § 14; Ore. Rev. Stat. § 135.240(2)(1953); R.I. Const. Art. I, § 9; R.I. Gen. Laws § 12-13-1.1 (1956); Tex. Const. Art. I, § 11a; Wis. Stat. Ann. § 969.035(2) (1985). Finally, three states (in addition to a number of those listed above) authorize denial of bail for an offense committed while the defendant was already released on bail. See Md. Code Ann. Art. 27, § 616 1/2(c) (Supp. 1985); Mass. Laws Ann. C. 276, § 58, para. 3 (Supp. 1986); Utah Code Ann. § 77-20-1(2) (1982).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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